Supreme Court of the United States,

OCTOBER TERM, 1905.

Ex Parte The National Enameling and Stamping Company and the Lalance & Grosjean Manufacturing Company.	No. 17. Original.

Petitioners' Points.

This application for a writ of mandamus brings up the question as to whether the Judges of the Circuit Court of Appeals for the Second Circuit were justified in dismissing petitioners' cross-appeal from a decree of the United States Circuit Court on the ground of lack of jurisdiction to entertain it.

The facts are briefly: In the petitioners' suit in equity brought in the United States Circuit Court for the Southern District of New York against the defendant New England Enameling Company to restrain infringement of United States Letters Patent No. 527,361, issued to Hubert Claus, on pleadings and proofs and argument had, a decree was entered on July 8, 1905 (*pp. 23-26*), sustaining the validity of claims 4, 5, 6, 7 and 8 of the

patent, adjudging them infringed, and enjoining defendants and directing an accounting, &c., thereunder (*fols. 70-72, 73-78*).

The decree also contained the following provision (*fol. 72*):

> "And it is further
>
> ORDERED, adjudged and decreed that the said Letters Patent No. 527,361 are, as to the first, second, and third claims thereof, invalid, and void because claiming that of which said Hubert Claus was not the original or first inventor or discoverer; and that the defendant has not infringed upon the ninth, tenth, eleventh and twelfth claims of said Letters Patent; and that as to the said first, second, third, ninth, tenth, eleventh and twelfth claims of said Letters Patent No. 527,361, the bill of complaint is dismissed."

The defendant New England Enameling Company thereupon appealed, not exclusively from the said decree or order granting said injunction, but generally, and on the merits, from the decree against it, including the accounting, &c., and prayed that the "*said decree* of said Circuit Court be reversed," &c. (*pp. 8 to 13*).

Thereupon petitioners perfected their cross-appeal from so much of said decree as dismissed their bill on the ground that claims 1, 2 and 3 were invalid, and that claims 9, 10, 11 and 12 had not been infringed (*pp. 14 to 18*).

The voluminous record on appeal, 3093 pages, was thereupon prepared by the clerks of the respective courts at a cost of $1,819.20, one-half of which $909.60 was by the clerks assessed against petitioners and paid by them, and the remaining half by the defendant New England Enameling Company (*pp. 27-28*).

The defendants thereupon moved the Circuit Court of Appeals to "dismiss the said appeal * * * for want of jurisdiction thereover" (*pp. 20, 21*).

The motion was argued by both parties on the 16th day of October, 1905, and briefs filed, after which, on the 21st day of December, 1905, the Court, without delivering any opinion, rendered its decision dismissing the petitioners' cross-appeal on the express ground of lack of jurisdiction to entertain it, as appears by the order entered in the cause on January 3, 1906 (*pp. 29, 30*).

The petitioners' contentions are:

First.—The Circuit Court of Appeals had jurisdiction to entertain petitioners' cross-appeal, whether the decree be viewed as a final or interlocutory decision, since the defendants' appeal, under Section 7 of the Act to Establish Circuit Courts of Appeals, as amended, "conferred upon the Court authority to consider and decide the case upon its merits," and thus opened the door for petitioners' cross-appeal.

Second.—The Circuit Court of Appeals had jurisdiction, because the decree of July 8, 1905, was, in so far as it finally dismissed petitioners' bill, as to certain specified claims of the patent in suit, a final decision within the meaning of that term, and within the meaning of the act establishing the appellate jurisdiction of said Court.

POINTS.

I.

Mandamus is the proper remedy where, as here, a court refuses to act in a matter properly before it, or to take jurisdiction in a proper case, and from such refusal no writ of error or appeal will lie.

Insurance Co. v. *Comstock, 16 Wall., 258, 271.*
Matter of Christensen Engineering Co., 194 U. S., 458.
Ex parte Hollon Parker, 131 U. S., 221.
Re Farmers Loan & Trust Co., 129 U. S., 206.
Re Hohorst, 150 U. S., 653.

In *Ex Parte Holon Parker* (*supra*), the petitioner applied for a writ of mandamus to the Supreme Court of Washington Territory, to reinstate an appeal to that court from a judgment of the District Court of the Territory, the Territorial Supreme Court having dismissed the appeal. It was objected that the mandamus was not the proper remedy. The writ was nevertheless granted, Mr. Justice Field saying:

> "The writ of mandamus lies, as held in *Ex parte Parker*, 120 U. S., 737, where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise."

The contention that *ultimately*, after accounting

&c., the decree which petitioners desire to appeal from *now*, may be repeated in a so-called "final decree," and *then* appealed from, will depend on whether this Court holds that part of the decree of July 8, 1905, which dismisses the bill, to be final or interlocutory.

But this Court has hitherto maintained that such contention constitutes no impediment to the issue of the mandamus.

In re Hohorst, 150 U. S., 653.

There the appeal of the petitioner, Hohorst, had been previously dismissed as being from a decision not final, since it remained for him to proceed with an accounting against some of the defendants before entry of final decree (Hohorst *vs.* Hamburg-American Packet Company, 148 U. S., 262).

Hohorst thereupon insisted, that he was remediless except through mandamus, because unable to have forthwith, and prior to such accounting, an appealable decree, dismissing his bill against one of his defendants for lack of jurisdiction. On these considerations, equally present in the case at bar, this Court followed its previous ruling in *Shaw* v. *Quincy Mining Co.* (*145 U. S., 444*) and granted the mandamus.

II.

Jurisdiction to entertain petitioners' cross-appeal logically and reasonably follows from the principles laid down in Smith vs. Vulcan Iron Works, 165 U. S., 518.

Prior to the decision in that case, the Courts

of Appeals in several of the circuits quite generally dismissed, for want of jurisdiction, cross-appeals like that of petitioners herein. In some of the circuits, and especially in the Second Circuit, the courts have persisted in this practice, as witness for instance the case at bar.

See also

Marden v. Campbell, 67 F. R., 809 (1st Circuit).
Western Elec. Co. v. Williams Abbott Co., 108 F. R., 952 (6th Circuit).
Dowagiac Co. v. Superior Co., 115 F. R., 890 (6th Circuit).
Thompson-Houston Co. v. Nassau E. Co., 112 F. R., 676 (2d Circuit).
Mfg. Co. v. Griswold, 67 Fed., 1017.

Since the decision on *Smith vs. Vulcan Iron Works, supra,* however, a diametrically different practice has been established in at least the Seventh and Fourth Circuits, where motions to dismiss such cross-appeals have been denied, and jurisdiction has been assumed on cross-appeals like that taken by the petitioners to hear and dispose finally of the entire case upon the merits.

Chicago Wooden Ware Co. v. Miller Co., 133 F. R., 541.
Scriven v. North, 134 F. R., 366.

In *Smith vs. Vulcan Iron Works,* which was for infringement of patent, it was held that by an appeal from an interlocutory order or decree granting an injunction under Section 7, jurisdiction is conferred on the Circuit Court of Appeals "to consider and decide the case upon its merits" (p. 525), *i. e.,* not only to review such order or decree, but also to finally dismiss the bill, and thus, as was done there to *finally* dispose of the suit.

It is submitted that jurisdiction to thus review the case on its merits, must logically include not only power to thus dismiss the bill, but also to comprehensively review and finally dispose of every issue presented by the record, relating to complainants' right to injunction, and thus to pass finally upon the validity and infringement of every claim of the patent.

Confidence is felt in the correctness of this assertion because this Court, in *Smith vs. Vulcan Works* cited with approval *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* (*72 Fed. Rep., 545*), in which Judge Lurton, for the Circuit Court of Appeals, Sixth Circuit, had in March, 1896, employed the following forcible and pertinent language:

> "If, under an appeal from a decree awarding an injunction, this Court obtains such a "record as to enable it, with justice to the "parties to the appeal, to hear and consider "the merits of the cause, it would be most "anomalous if we have not the power to de"cide. The judicial function of considering "involves the function of determining. The "decision of an Appellate Court is final, and "no second appeal is maintainable, except as "to matters reserved, or proceedings subse"quent to the first appeal" (p. 560).

Our understanding of *Smith* vs. *Vulcan Works* is in accord with that of the Circuit Court of Appeals of the Seventh Circuit as expressed in *Chicago Wooden Ware Co.* vs. *Miller Co.* (*133 Fed. Rep., 541*). There the circumstances being substantially identical with those at bar, on motion to dismiss cross-appeal, the Court said:

> "Smith *vs.* Vulcan Iron Works, 165 U. S., "578, wherein it was held that on an appeal "from a decree like this the appellate tribun"al with all the pleadings and all the evidence "before it for an independent hearing, had

"'authority to consider and decide the case "'upon its merits,' to the end that the parties "might be saved the time, trouble and ex- "pense that would be involved in carrying on "further litigation in the Circuit Court in a "way that was contrary to the views of the "Court of Appeals on the ultimate merits. "Here defendants present a complete record, "containing all the pleadings and proofs. "They do not attack merely the injunction "respecting the second patent, and that on "the ground that it was temporary, and im- "providently issued; but they contend that, "as to the five claims of the two patents held "valid, the ultimate merits of the question of "validity and infringement are in their "favor. If we were not authorized now to "consider and decide the merits with respect "to claim 1 of the first patent, which was in- "cluded in the pleadings and proofs and "held invalid, the result would be that the "Circuit Court would proceed with the ac- "counting on a basis that does not accord "with our views of the ultimate merits, and "a new accountng would have to be taken "after a subsequent appeal to this Court. "Motion overruled" (pp. 544, 545).

In the Fourth Circuit the same result was arrived at in *Scriven* v. *North* (*supra*), though by a somewhat different reasoning. There, also, defendants' motion to dismiss complainants' appeal from parts of an otherwise interlocutory decree dismissing bill was denied, and jurisdiction retained.

Petitioners may well concede that they cannot *on their own initiative,* create the status on which depends the jurisdiction referred to. It might, possibly, violate established precedent to permit *in the first instance,* from unacceptable parts of an interlocutory decree to "try the case piecemeal." But this is distinctly not the present situ-

ation. The status conferring "jurisdiction over the entire case" has been created solely on the defendant's own initiative, by availing itself of the privilege accorded to it alone, by Section 7.

By taking such appeal, the decree dismissing the bill, as to the claims found to be void, and not infringed, does not become isolated, but it is stamped as a "final decision" within the meaning of Section 6 of the Act of March 3, 1891, and can therefore be brought up on a cross-appeal, Thus the incongruity of finding the decree, in so far as it is adverse to the defendant, in the Appellate Court, and in so far as it is adverse to the complainant in the court of first instance, is avoided, and an adjudication "piece-meal" with all that is implied in that term, and with all its latent possibilities, is prevented.

It was purely optional with defendant to either avail itself of this, its peculiar privilege, or, without prejudice, postpone its appeal until final decree. In the latter event, unquestionably, this Court must then review and on a single hearing dispose of all the claims upon the merits. It will be observed, therefore, that the hearing of this case "piecemeal" would occur, if at all, only by reason of the defendant's action in having at this stage of the case carried it to the Appellate Court, and the refusal of the Court of Appeals to entertain the petitioner's cross-appeal; whereas the assumption of jurisdiction over such appeal, will enable the appellate tribunal to consider the merits of the entire case, once for all.

It is obvious that the result of dismissing complainants' present appeal, and thereby segregating out of the case, for the present, the issues respecting claims 1, 2, 3, 9, 10, 11 and 12, may involve at least two accountings, and also from one to three additional appeals, whereas a compre-

hensive review of the entire case on the present appeal will either in itself finally dispose of the case or lead to only one accounting and appeal therefrom.

A result even more serious would occur, if the appellate court, acting under the power which it possesses by virtue of the rule laid down in *Smith* v. *Vulcan Iron Works,* should dismiss the bill of complaint on the defendant's appeal. In such an event, the petitioners would find themselves out of court, without having had an opportunity of presenting their contentions with respect to the claims as to which the lower court had already dismissed the bill of complaint.

Non constat if the entire case, upon its merits, that is the case as it was presented for consideration to the court of original jurisdiction, were before the appellate tribunal, the latter might sustain the bill of complaint on the basis of the claims which the court of first instance may have adjudged to be either void or not infringed, even though the views of the appellate tribunal as to the claims sustained by the lower court, might be utterly at variance with those embodied in the decree appealed from.

It would be attributing to Congress a most extraordinary intention, to predicate upon its language, construed as it has been by this court, these possible consequences.

An obvious additional hardship would result from a division and partial review of the patent at this juncture. The legal presumption of the novelty and utility of Claus' invention abstractly considered has been confirmed by the Circuit Court. It is, at this point, *res adjudicata* between those parties that a new and useful invention was disclosed to the world by Claus' specification. Should the Circuit Court of Appeals opine that

the Court below erred in its selection of the claims most proper to protect it, precedent and justice demand that the remaining claims be simultaneously reviewed, on the merits, to determine whether they are not sufficient to protect the inventor.

Consider also the burden upon the Court, to say nothing of litigants, of several reviews of the whole of this exceptionally difficult and complex case involving a printed record of 3,093 pages, in order to determine separately, and at different hearings, the validity of different claims.

Consider also that, pending final decree on accounting, complainants are, by dismissal of their bill upon claims 1, 2, 3, 9, 10, 11 and 12, as effectively deprived of their property therein, as though it had been material and taken from them by execution, thus bringing this case within the exception recognized by this Court in *Forgay* v. *Conrad, 6 Howard, 201.*

See *Scriven* v. *North, 134 Fed. Rep., 366.*

It would thus appear that the granting of this mandamus is demanded by every consideration of equity, expediency, and orderly and economical administration of justice.

Finally, it will be observed, in this connection, that defendant's appeal is, by its assignment of errors, expressly taken, not merely from the injunction, but also broadly upon the merits (fols. 30 to 37), thus necessitating a review of the entire record, with the limited result, as they now egregiously contend, of passing solely upon five only out of a total of twelve claims still in controversy.

The effect of the Act of March 3, 1891,

Chapter 517, establishing Circuit Courts of Appeals, and especially of Sections 6 and 7, now under consideration, is to make applicable to appeals taken under that section, the practice in equity as formerly administered in the Courts of Chancery in England and of the State of New York, and in the House of Lords, of examining the merits of the cause and of passing upon the rights of the respective parties to the subject-matter of litigation, in order to save both parties the needless expense incident to a protracted and unnecessary litigation, and the appellate courts the labor and inconvenience of reviewing decrees of inferior courts on repeated appeals, to say nothing of the complications likely to result from successive appeals, by which fractional parts of the decree, or of the issues involved in the litigation, are presented to the appellate tribunals for consideration.

In *Smith* v. *Vulcan Iron Works* (*supra*), this practice was reinstated in its application to the question as to whether or not, on an appeal from an interlocutory order or decree granting an injunction and ordering an account in a patent case, the Circuit Court of Appeals might decide the case on its merits, and render a final decree dismissing the bill.

The logical conclusion from this decision would seem to be, that on such an appeal the Circuit Court of Appeals is not confined to a dismissal of the bill, but, if the entire record in the cause is before it, may grant such relief to both of the parties as the record indicates them to be entitled to.

This seems to have been the view of the Court in *Bissell Carpet Sweeper Co.* v. *Goshen Carpet Sweeper Co.* (*supra*), which was considered in

Smith v. *Vulcan Iron Works* (*supra*), where Judge Lurton said:

> "It is proper therefore to assume that when Congress undertook to enlarge the right of appeal, it did so in the full light of the history of appeals in equity cases, and with a full appreciation of the distinction between interlocutory orders or decrees and final decrees."

In *2 Daniell's Chancery Pleading & Practice, Sixth American Edition, p. 1489,* the English practice on appeals in Chancery cases is stated as follows:

> "Upon a rehearing or appeal the whole case is open to the respondent, so that, if the appeal is against the whole decree it is competent for the Court to modify the decree by making it more favorable to the respondent. Thus, where a plaintiff, who was successful in obtaining a decision against the defendant, with costs, not being satisfied with the view which the Vice-Chancellor had taken of the case, had the cause reheard before Lord Cottenham, in order to obtain an alteration in the decree more favorable to himself, his lordship, upon the rehearing, being of opinion that the plaintiff was not entitled to any relief at all, dismissed his bill, with costs (*Oldham* v. *Stonehouse, 3 M. & C., 317*). * * * So where the appeal is against part of the decree only the respondent may, if he considers it necessary, go into the whole case, whilst the appellant can only go into the parts complained of in his petition. Therefore, where there were two questions in the cause, one being whether the executor was entitled to surplus, and the other whether a legacy given to him by the will was in satisfaction of a debt due to him by the testator, and upon the first point the Court decided against him because he had put in an answer in which he admitted himself acountable for the surplus, but the second point was deter-

> mined in his favor, whereupon the plaintiff appealed against the last decree, Lord Cowper held that it was competent for the defendant to go into the first point, though he eventually did not decide in his favor (*Rawlins* v. *Powell, 1 P. Wms., 293, 300*)."

The rule has been stated in *Hunter* v. *Belcher, 2 DeGex J. & S., 201,* that the Appellate Court may make a decree as upon a trial *de novo.*

In *Sherwin* v. *Shakspear, 5 DeGex M. & G., 523,* Lord Justice Knight Bruce said:

> "I have no doubt on the point, that upon an appeal from part of a decree the whole case is open to the respondent. He may be satisfied with the decree as it stands, but that does not prevent him from contending, if its correctness is called in question in any particular, that it should be made more favorable to him in any other."

In *LeGuen* v. *Gouverneur, 1 Johnson's Cases, 436,* decided in 1800, when Chancellor Kent was a member of the Court of Errors, that learned jurist declared:

> "It is the settled rule of the House of Lords in England, upon appeals, always to give such a decree as the Court below ought to have given. This was the great and leading maxim in their system of appellate jurisprudence, and instances are, accordingly, very frequent, in which the Lords on appeals from interlocutory orders in Chancery, have reversed the order and decided fully on the merits. * * * Possessing the authority to decide finally, I think we ought to exercise it in this instance. * * * *All the proofs are before us.* * * * *The cause is as ripe here as it was in the Court below for ultimate decision.*"

In the same case Mr. Justice Radcliff said (p. 499):

> "I have also no doubt that this Court may proceed further, if it appear that the merits are fully in its possession, and determine finally between the parties. That such is the power, and frequently the practice, of the House of Lords in England, is evident from the cases which have been cited. * * * On similar appeals, they affirm, reverse, or alter the order for an issue, and sometimes proceed to dismiss the bill, or otherwise decree on the merits. The power of this Court is the same in this respect. I can see nothing in our constitution or laws to restrain it. * * * In this case, the propriety of making a final decree arises out of the appeal itself, which brings before us the whole merits of the cause. * * * The power in the last resort, and I have no doubt that it appears to me essential to a court of appeal is vested here."

In *Consequa* v. *Fanning, 3 Johns. Ch., 587*, Chancellor Kent said:

> "There is considerable variation in the objections made to the decree as stated in the petition for a rehearing, and in the points on which the cause was reargued. But I apprehend the rule to be well settled, that upon a rehearing, the cause, with respect to the party who petitions to rehear, is open only to those parts of it complained of in the petition; though, as to the other party, it is open as to the whole matter of the decree. The rule was so declared by Lord Chancellor Cowper in *Rawlins* v. *Powell, 1 P. Wms., 300*, and it is to be met with in all the subsequent treatises on the subject."

In *Dale* v. *Roosevelt, 6 Johns. Ch. 255*, the same doctrine was restated, the Chancellor saying:

> "On a rehearing the cause is entirely open

> as to the party in whose favor the former decree was given; and as to the other party, it is open only in respect to the parts of the decree complained of."

Chancellor Walworth approved of *Consequa* v. *Fanning* (*supra*) in *Ferguson* v. *Kimball, 3 Barb. Ch., 616.*

In more recent times the practice on appeal in English Chancery cases has been liberalized to even a greater degree than as above stated, a reference to the authorities being useful as indicating the present tendency.

In *1 Daniell's Chancery Practice, 7th Ed., p. 1075*, the author says:

> "An appeal being by way of rehearing, the court of appeal is not confined to the points mentioned in the notice of appeal. The court of appeal has all the powers and duties as to the amendment and otherwise of the High Court, and has power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require, and no interlocutory order or rule from which there has been no appeal is to operate so as to bar or prejudice the court of appeal from giving such decision upon appeal as may be best."

The Orders of Court, LVIII., 4, are to the effect that the above mentioned powers may be exercised by the Court of Appeal, notwithstanding the notice of appeal may pray that part only of the decision may be reversed or reviewed, and that such powers may also be exercised in favor of all or any of the respondents or parties.

III.

The Circuit Court of Appeals erred in dismissing petitioners' appeal, because it had jurisdiction to entertain and determine it; the decree of July 8, 1905, in so far as it dismissed petitioners' bill as to all matters determined by it respecting claims 1, 2, and 3 and 9, 10, 11, 12, being in substance and effect, a "final decision," within the meaning of that term, as used in the act, respecting the appellate jurisdiction of said Court.

Forgay, v. Conrad, 6 How., 201.
Hill v. Chicago & Evanstown R. R. Co., 140 U. S., 52.

The decree expressly declares that:

> "As to the first, second, third, ninth, "tenth, eleventh and twelfth claims of said "Letters Patent No. 527,361, *the bill of com-"plaint is dismissed.* * * *
>
> "And it is further ordered, adjudged and "decreed that neither party in this cause re-"cover as against the other any costs, charges "and disbursements heretofore incurred "herein."

In referring the accounting to the Master the decree omits the usual words to the effect that "all other and further questions not determined by this decree be reserved until the coming in of the Master's report."

Accounting herein has not yet begun, and obviously it could not possibly be terminated, and final

decree thereon entered within six months after July 8, 1905.

In *Forgay* v. *Conrad, supra,* though the decree therein entered was classifiable as "*interlocutory,*" since it directed an accounting by a Master, this Court nevertheless treated it as an appealable final decision, partly in consideration of its awarding execution whereby title to property might be divested.

It is submitted that the decree herein, in so far as it invalidates claims 1, 2 and 3 of the Claus patent, equally divests complainants of their property, *viz.,* the exclusive right to use, &c., the invention purporting to be covered by these claims. The resulting loss may be irreparable.

In *Hill* vs. *Chicago, &c., R. R. Co.* (*supra*), this Court held that a so-called interlocutory decree dismissing the bill as to certain defendants and upon "all matters and things in controversy," except an amount to be paid as ascertained by an accounting thereby directed, was, in effect and substance, final, except as to such accounting, and that the time within which to appeal from the decisions therein made, began to run from its entry instead of from the time of the entry of the so-called final decree rendered after the accounting, two years later.

In *Scriven* vs. *North* (*supra*), a suit for infringement of patent, trademark and other property rights, the Circuit Court of Appeals of Fourth Circuit followed the principles enunciated by the two cases referred to, and permitted immediate appeal from those parts of the interlocutory decree which dismissed the bill.

It is thought unnecessary to enlarge further upon those peculiarities of the decree at bar which bring it within the foregoing definitions of a "final decision." It "orders, adjudges and decrees" the

dismissal of the bill upon certain specified claims, each in fact a separate patent, and cause of action; (*United Nickel Co.* v. *California Works, 25 Fed. Rep., 475, 479*). It is, in its terms, absolutely comprehensive and conclusive as to that part of the bill. It is manifest that a final decree entered after the accounting, could neither add nor subtract, one jot or one tittle, from the finality of the adjudication thus made by this so-called interlocutory decree. There is absolutely nothing left to be determined by the Circuit Court, except the amount of the recovery for infringement of claims 4, 5, 6, 7, 8.

Even the question of costs, left open in the *Scriven* case, has here been finally adjudicated by the Circuit Court.

Should the appeal which the petitioners are now seeking to take, be dismissed and the case should after the entry of a so-called final judgment, ultimately reach the United Circuit of Appeals, petitioners would find themselves remediless, should it be decided, as in the cases cited, that the decree of July 8, 1905, herein, was final in so far as it dismissed the bill, and that petitioners' time to appeal therefrom had expired.

The decision of the United States Circuit Court is "final", as to that part of the decree, which dismissed the bill of complaint. It was "interlocutory", as to that part of the decree only, which was adverse to the defendants, and which has been appealed pursuant to the express authority of Section 7. As to the latter an accounting was directed, but none the less the decree has been made reviewable without waiting for the result of the accounting. As to the former within the rule of *Bosturek* vs. *Brinckerhoff, 106 U. S., 3*, it has terminated the litigation as to the subjects with which it deals, on the merits of the case, so that, if there

should be an affirmance of it, on appeal, "the court below would have nothing to do but to execute the judgment or decree it had already rendered." Hence, the determination of the Court of Appeals, dismissing the petitioners' cross-appeal, involves the paradox, that it can review a decree to the extent that it is "interlocutory," but not those features of it, as to which it is unquestionably "final," even though both portions of the decree are based on the self-same record.

IV.

The prayer of the petition should be granted and a peremptory mandamus issue that the Circuit Court of Appeals of the Second Circuit shall entertain and determine the petitioners' cross-appeal.

Arthur v. Briesen,
Louis Marshall,
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